



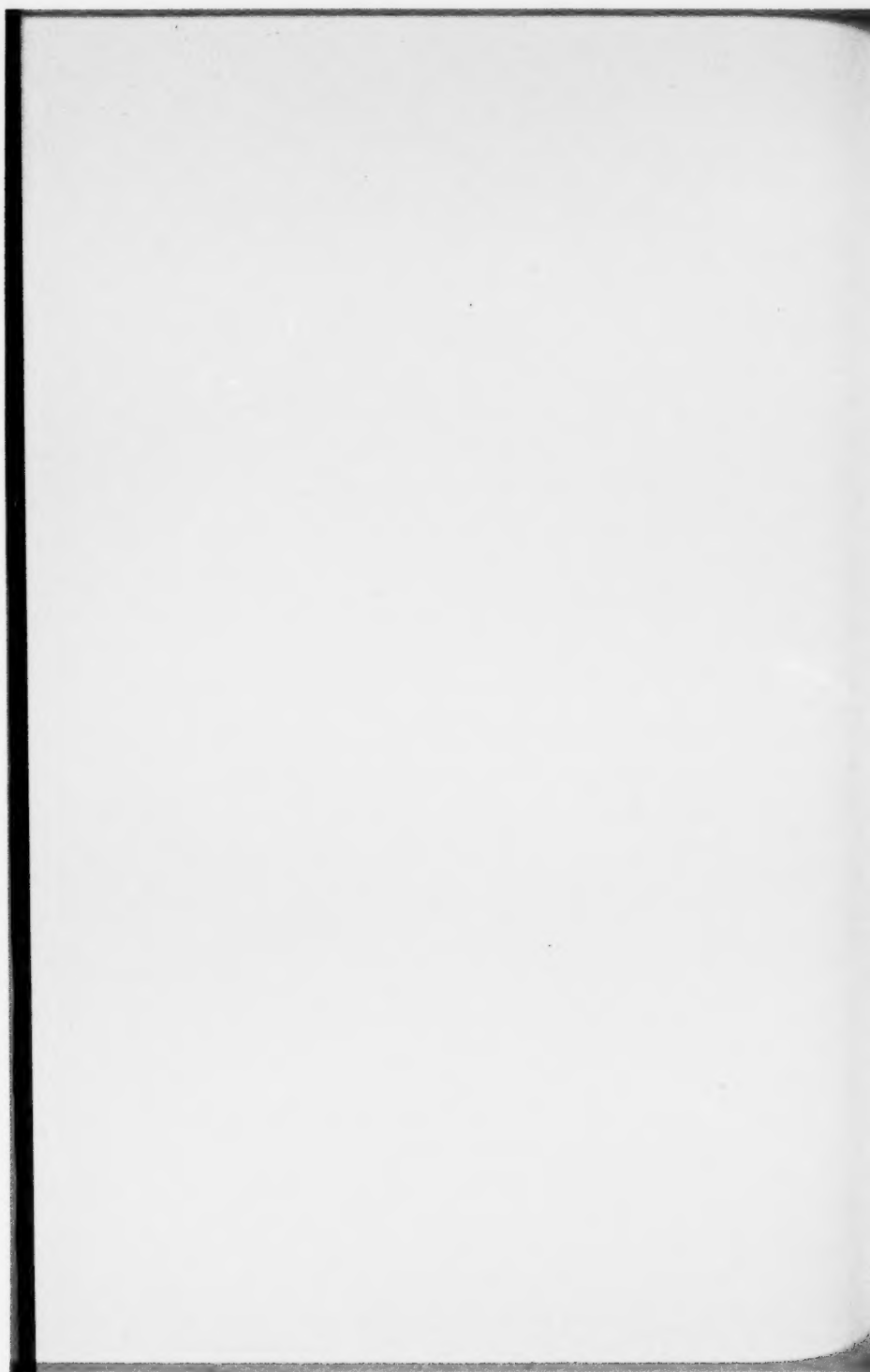
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(11)



In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 90

RODEN COAL COMPANY, INCORPORATED, PETITIONER

v.

THE UNITED STATES

*ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT
OF CLAIMS*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 14-19) is not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered December 1, 1941 (R. 19). Motions for a new trial were overruled February 2, 1942 (R. 20). The time within which to file a petition for writ of certiorari was extended to and including May 20, 1942, by order of the Chief Justice (R. 20). The petition for writ of certiorari was filed May 16, 1942 (R. 20). Jurisdiction of this Court is invoked under section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

The Government condemned land for use in creating a navigable canal. Thereafter the canal was kept dredged to a depth not exceeding the authorized project dimensions and the reasonable needs of navigation. Land adjacent to the canal, on which heavy structures had been constructed, subsided, and this property suffered substantial damage. The question is whether the Government is obligated to compensate the landowner for the damage.

STATEMENT

Petitioner, a New York corporation, engaged in the retail coal business, in 1933 acquired a tract of land on the Harlem River having an area of approximately 44,388 square feet (R. 9). The tract was used by petitioner as a coal yard with hoists, coal pockets, scales, offices, bins, cranes, a screening plant, and other facilities appertaining to a coal yard (R. 9-10). Coal was received at the water front from barges and was retailed to customers by truck (R. 10).

The water course known as the Harlem River, which separates Manhattan Island from the mainland, formerly consisted of the Harlem River and Spuyten Duyvil Creek (R. 10). The desirability of improving this waterway was under consideration in 1873 but Congress would not authorize the expenditure of money appropriated for improving the waterway until certain land had been acquired

free of cost to cut a canal across Dyckman's Meadows, in this way avoiding a round-about loop formed in the then existing waterway (R. 10). By 1887 the land necessary to cut a canal across Dyckman's Meadows was obtained by the United States without expense and the cut was completed in 1895 (R. 10).¹

The project adopted by Congress provided for a channel through Dyckman's Meadows 18 feet in depth and 350 feet in width (R. 10). In 1907 a channel 15 feet deep and 150 feet wide was dredged which passed the frontage of the site of land now owned by petitioner (R. 10). The property now owned by petitioner has fronted on a navigable artificial waterway since completion of the cutoff in 1895 (R. 11) and the channel in front of petitioner's property has been maintained at a minimum depth of fifteen feet since 1907 by intermittent dredging (R. 11). The waterway in the general vicinity of the property was dredged in 1926 and in 1929-1930 (R. 11). There had been some settlement of the land following the dredging

¹ The land was secured in condemnation proceedings pursuant to New York statutes which authorized the United States to take so much of the land as might be necessary for the location, construction, and convenient use of the contemplated project. The cost of the proceedings, as well as the cost of the land acquired, was defrayed by assessments against contiguous landowners whose properties were increased in value by the improvements undertaken. N. Y. Laws, 1876, c. 147; N. Y. Laws, 1879, c. 345; N. Y. Laws, 1880, c. 65; N. Y. Laws, 1881, c. 61.

operations of 1926, and after the dredging operations of 1929-1930 it was necessary to repair the bulkheads (R. 12), permission being obtained from the War Department by petitioner's predecessor in title to place sheet-steel piling along the face of the existing bulkhead (further encroaching on a waterfront line established by the Secretary of War on October 18, 1920, from two feet seven inches to three feet) (R. 11).

In 1937 the United States commenced dredging operations close to petitioner's bulkhead (R. 11). Petitioner's president communicated with the engineer in charge and stated that he feared that the dredging would damage petitioner's bulkhead (R. 11). On November 3 the Government engineer discovered a crack in petitioner's land (R. 11-12), and thereupon the dredge was removed to a position midstream from which it worked gradually shoreward toward the bulkhead (R. 12). On November 18, 1937, it was discovered that the earth shoreward of the bulkhead had settled about one foot and petitioner was endeavoring to prevent further inclination channelward of the bulkhead by the use of steel tie rods (R. 12). Thereupon dredging operations in the vicinity of petitioner's bulkhead were discontinued (R. 12). No dredging in front of petitioner's property ever exceeded the authorized project dimensions or the reasonable needs of navigation (R. 12).

The dredging weakened the foundation support of the bulkhead piling, resulting in subsidence of

petitioner's coal yard and disintegration of the wooden portion of the bulkhead to such an extent as materially to damage the coal yard and to make useless a substantial part of the yard (R. 12). The bulkhead was of insufficient depth below the bottom of the river and of insufficient strength to withstand loss of material at its base (R. 12), and the court below found that petitioner's damages were due to its failure to maintain an adequate bulkhead and to its neglect to install adequate foundations for its coal pockets, derrick, and other heavy shore equipment (R. 13). The fair and reasonable cost of repairing petitioner's property was \$45,044, and the market value of petitioner's property was diminished in value by the amount of \$89,162 as a result of the subsidence of its bulkhead and land.

In 1938 petitioner brought suit in the Court of Claims against the United States.² The court, after entering findings of fact, which have been summarized above, concluded that the United States had acquired all rights necessary to the construction and maintenance of the canal (R. 15) and that any damage to petitioner's property to which the

² On October 11, 1941, the receiver of the First National Bank and Trust Company of Yonkers, New York, filed an intervening petition alleging that as mortgagee it was justly entitled to any award made (R. 5-7). The United States filed a general traverse to this intervening petition (R. 7), and petitioner denied that the claim of the intervening receiver was one which could be settled in the pending action (R. 7-8). The disposition which the court below made of the case rendered it unnecessary for it to adjudicate the claim of the receiver.

dredging operations might have contributed was indirect and consequential. The court accordingly entered judgment dismissing the petition.

ARGUMENT

Petitioner contends that in the condemnation proceeding the United States acquired no marginal or slope rights in the lands adjacent to the canal (Pet. 15-17), and that the subsidence of the land into the canal was a taking of its property obligating the United States to pay just compensation therefor (Pet. 19-20). The court below held that the petitioner acquired the property subject to the existing right of the United States to maintain the canal at the authorized depth and width, and that the damage to petitioner's property by reason of its collapse was consequential to the exercise of a lawful power by the Government. The decision below is correct, and the case presents no question requiring review by this Court.

1. Petitioner's land was used as a coal yard on which were erected hoists, coal pockets, scales, offices, cranes, a screening plant, and other apparatus (R. 9-10). As the Court of Claims pointed out, these "large facilities greatly increased the load which the bulkhead had to bear" (R. 16) and petitioner's damages were due to its failure to maintain an adequate bulkhead and its neglect to install sufficient foundations for its coal pockets, derricks, and other heavy shore equipment (R. 13). In these circumstances, the Government was plainly

under no duty to afford lateral support, for it is settled doctrine that the obligation to provide lateral support to adjacent land is limited to land in its natural condition and does not extend to land on which improvements have been erected. *Transportation Co. v. Chicago*, 99 U. S. 635, 645.³

2. Moreover, any right of lateral support which the adjacent landowners may have had was acquired by the Government in the condemnation proceedings. The Government in 1886 condemned the land bordering on petitioner's waterfront for use in creating the canal (R. 11) and, as the court below concluded, "obtained from the then owners of the property involved in this suit title to such property and property rights as were necessary to the construction and maintenance of the canal * * * ,

³ This rule prevailed in New York at the time the United States acquired title to the condemned land. *Riley v. Continuous Rail Joint Co.*, 110 App. Div. 787, aff'd 193 N. Y. 643; *Bergen v. Morton Amusement Co.*, 178 App. Div. 400, aff'd 226 N. Y. 665. The New York statutes cited by petitioner (Pet. 26-27) are not effective to impose additional obligations on the United States. One statute (New York Laws, 1937, c. 929, Art. 9, sub-art. 2, Section C26-384.0) refers only to support for adjacent "earth." The other (New York Laws, 1937, c. 929, Art. 9, sub-art. 2, Section C26-385.0) refers to excavations below the "curb" and it is doubtful if the statute applies at all to dredging for canal purposes. Moreover, the United States acquired the land free from the obligation of providing support for adjacent land on which heavy facilities had been or would be erected, and the State of New York cannot subsequently impose additional obligations or burdens on the United States in the performance of its governmental functions. *Arizona v. California*, 283 U. S. 423, 451; *Hunt v. United States*, 278 U. S. 96; *Johnson v. Maryland*, 254 U. S. 51.

including any rights adjacent to the actual dimensions of the navigable channel that might be affected by construction of the navigable waterway" (R. 15). Cf. *United States v. Cress*, 243 U. S. 316, 329. Any rights of petitioner's predecessors in interest should have been and presumably were asserted in the condemnation proceedings. *United States v. Chicago, B. & Q. R. R.*, 82 F. (2d) 131, 136 (C. C. A. 8) certiorari denied, 298 U. S. 689; cf. *United States v. River Rouge Co.*, 269 U. S. 411, 418-419; *United States v. Grizzard*, 219 U. S. 180; *Sharp v. United States*, 191 U. S. 341; see Orgel, *Valuation under Eminent Domain*, 199, note 88; Nichols, *Eminent Domain* (2d ed. 1917), 1360-1361, 1240, and cases cited. The dredging in front of petitioner's property has never exceeded the authorized project dimensions or the reasonable needs of navigation (R. 12).⁴

⁴ The decision below may be supported on an independent ground. The federal statutes authorizing the project to be undertaken by the United States (Act of June 18, 1878, c. 264, 20 Stat. 158; Act of March 3, 1879, c. 186, 20 Stat. 372) expressly provided that the money appropriated for the project was "not to be available until the right of way is secured to the United States free of cost", and Congress consistently adhered to this position in subsequent legislation. Act of March 4, 1913, c. 144, 37 Stat. 803. Since any acquisition at expense to the Government was forbidden, the taking of petitioner's easement of support was unauthorized if, as petitioner contends, the taking involved an obligation to make compensation and, therefore, affords no basis of recovery. *Hughes v. United States*, 230 U. S. 24; cf. *Hooe v. United States*, 218 U. S. 322, 334; see *United States v. North American Co.*, 253 U. S. 330, 333.

CONCLUSION

The decision of the Court of Claims is correct. There is no conflict of decisions, and the case presents no question requiring review by this Court. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1942.